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Yu Gui v Jeffery Law Siew Su & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(IM)-278–01 OF 2013
ABDUL WAHAB PATAIL, MOHTARUDIN BAKI AND MAH WENG KWAI JJCA
29 MAY 2015

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Civil Procedure — Appeal — Appeal against decision of High Court — Dispute over sale of two containers of goods — Assessment by senior assistant registrar — High Court set aside and dissolved ex parte orders for interim injunction granted — Damages ordered to be assessed by deputy registrar — Whether supplementary records of appeal filed within time — Whether leave of court required — Rules of the Court of Appeal 1994 r 18(4)

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The appellant appealed against the decision by the judge in chambers to allow an appeal from the assessment by the senior assistant registrar. The High Court had set aside and dissolved ex parte orders for interim injunction granted and ordered damages occasioned to be assessed by the deputy registrar and paid by the respondents to the appellant. The dispute in this case revolved around a company which was set up in 2009 and was involved in the business of production and sale of veneer. It rented premises with 13 factory machineries under a tenancy agreement. Dispute arose over the sale of two containers of goods. The respondents raised preliminary objections that the first supplementary record of appeal was filed out of time and the second supplementary record of appeal was served in October just before the appeal, both without leave of the court. The respondents submitted that the record of appeal was in breach of the mandatory r 18(4) of the Rules of the Court of Appeal 1994 and Practice Direction No 2 of 1985 because, inter alia, Part A did not contain the written judgment or grounds of decision or order of the High Court judge; Part B did not have the notes of the proceedings of the appeal before the High Court; and Part C which was supposed to contain the documentary exhibits, contained the parties' submissions and not the exhibits. According to the respondents, there was no application by the appellant for extension of time and no affidavit to explain the delay.

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Held, allowing the appeal and setting aside order of judge in chambers; reinstating order of senior assistant registrar with costs of RM15,000:

I

(1) Even though it is mandatory to obtain leave, leave would be granted if such leave would enable the appeal to be heard on its merits without injustice to the respondent. In this case, the respondent chose to sit, hear

out the submissions for the appellant and only after submissions for the appellant was completed did the respondent objected. The submissions for the appellant were made on the basis of the appeal records as rectified by the supplementary records of appeal which although filed without leave of the court, was not objected to by the respondents. Since the objection was mere technical non-compliance, and raising the objection not before but after submissions for the appeal was completed suggested that the objection was not made bona fide in good faith to avoid a substantial miscarriage of justice. Accordingly, the supplementary records of appeal was accepted and the preliminary objection was dismissed (see paras 9–10 & 14–15).

(2) The basis of reasoning upon which the decision was made to allow the appeal and set aside the decision of the senior assistant registrar was flawed. When the order was made for assessment before the senior assistant registrar, the latter was formally invested with jurisdiction to make that assessment. It behoved the parties to place evidence before the senior assistant registrar to enable the latter to make the assessment according to law. If any party fails to place that evidence, it would be too late to scamper to the judge in chambers for a second bite at the cherry on the grounds that the appeal is a rehearing (see para 21).

(3) Provision that an appeal is a rehearing means it is a rehearing of what is placed in evidence before the trial court, and the High Court intervened in accordance with s 29 of the Courts of Judicature Act 1964 that 'all civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court'. The exercise of judicial discretion by the senior assistant registrar was made by an order of the High Court to be exercised by the senior assistant registrar. Therefore, there was no merit in the submission by the respondents (see paras 24 & 29).

[Bahasa Malaysia summary

Perayu telah merayu terhadap keputusan oleh hakim dalam kamar untuk membenarkan rayuan daripada penilaian oleh penolong kanan pendaftar. Mahkamah Tinggi telah mengetepi dan membatalkan perintah-perintah ex parte untuk injunksi interim yang diberikan dan memerintahkan ganti rugi yang timbul dinilai oleh timbalan pendaftar dan dibayar oleh responden-responden kepada perayu. Pertikaian dalam kes ini berkisarkan syarikat yang telah ditubuhkan pada 2009 dan terlibat dalam perniagaan penghasilan dan jualan venier. Ia menyewakan premis dengan 13 kilang mesin di bawah perjanjian sewa beli. Pertikaian timbul rentetan jualan dua kontena barangan. Responden-responden menimbulkan bantahan awal bahawa rekod rayuan tambahan pertama telah difailkan di luar waktu dan rekod rayuan tambahan kedua yang disampaikan dalam bulan Oktober sejurus sebelum

rayuan, kedua-dua tanpa kebenaran mahkamah. Responden-responden berhujah bahawa rekod rayuan telah melanggar secara mandatori k 18(4) Kaedah-Kaedah Mahkamah Rayuan 1994 dan Arahan Amalan No 2 tahun 1985 kerana, antara lain, Bahagian A tidak mengandungi penghakiman bertulis atau alasan-alasan keputusan atau perintah hakim Mahkamah Tinggi; Bahagian B tidak mempunyai nota-nota presiding rayuan di hadapan Mahkamah Tinggi; dan Bahagian C yang sepatutnya mengandungi ekshibit-ekshibit dokumentar, mengandungi penghujahan pihak-pihak dan bukan ekshibit-ekshibit. Menurut responden-responden, tiada permohonan oleh perayu untuk lanjutan masa dan tiada afidavit untuk menjelaskan kelewatan itu.

Diputuskan, membenarkan rayuan dan mengetepikan perintah hakim dalam kamar; mengenakan semula perintah penolong kanan pendaftar dengan kos sebanyak RM15,000:

(1) Walaupun ia mandatori untuk mendapatkan kebenaran, kebenaran akan diberikan jika kebenaran sebegitu membolehkan rayuan didengar atas meritnya tanpa ketidakadilan kepada responden. Dalam kes ini, responden memilih untuk duduk mendengar penghujahan bagi pihak perayu dan hanya selepas penghujahan bagi pihak perayu selesai barulah responden membuat bantahan. Penghujahan bagi pihak perayu telah dibuat berasaskan rekod rayuan sepertimana diperbetulkan oleh rekod rayuan tambahan yang mana meskipun difailkan tanpa kebenaran mahkamah, telah tidak dibantah oleh responden-responden. Oleh kerana bantahan itu hanya ketidakpatuhan teknikal sahaja, dan menimbulkan bantahan bukan sebelum tetapi selepas penghujahan untuk rayuan itu selesai mencadangkan bahawa bantahan itu tidak dibuat secara suci hati dengan niat baik bagi mengelakkan pelaksanaan ketidakadilan ketara berlaku. Sewajarnya, rekos rayuan tambahan telah diterima dan bantahan awal itu ditolak (lihat perenggan 9–10 & 14–15).

(2) Asas alasan yang mana keputusan dibuat untuk membenarkan rayuan itu dan mengetepikan keputusan penolong kanan pendaftar adalah bercacat. Apabila perintah itu dibuat untuk penilaian di hadapan penolong kanan pendaftar, beliau mempunyai bidang kuasa sewajarnya untuk membuat penilaian tersebut. Pihak-pihak sepatutnya mengemukakan keterangan di hadapan penolong kanan pendaftar bagi membolehkan beliau membuat penilaian menurut undang-undang. Jika mana-mana pihak gagal untuk mengemukakan keterangan tersebut, ia sudah terlewat untuk berhadapan dengan hakim dalam kamar untuk merayu atas alasan bahawa rayuan itu ada perbicaraan semula (lihat perenggan 21).

(3) Peruntukan bahawa satu rayuan adalah pembicaraan semula bermaksud adalah perbicaraan semula tentang apa yang dikemukakan dalam keterangan di hadapan mahkamah perbicaraan, dan Mahkamah Tinggi

telah campur tangan menurut s 29 Akta Mahkamah Kehakiman 1964 bahawa 'all civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court'. Pelaksanaan budi bicara kehakiman oleh penolong kanan pendaftar telah dibuat oleh perintah Mahkamah Tinggi untuk dilaksanakan oleh penolong kanan pendaftar. Oleh itu, tiada merit dalam penghujahan oleh responden-responden (lihat perenggan 24 & 29).]

Notes

For cases on appeal in general, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 793–1970.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [2000] 1 MLJ 335; [2000] 2 CLJ 473, CA (refd)

Chuah Tim Lan v RHB Bank Bhd [2008] 6 MLJ 793; [2008] 6 CLJ 500, CA (refd)

Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad [2010] 2 MLJ 41; [2010] 1 CLJ 444, CA (refd)

Dato' Valumalai @ M Ramalingam s/o V Muthusamy v Dato' Dr Tan Chin Woh [2010] MLJU 410; [2010] 5 CLJ 758, CA (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)

Goo Sing Kar v Dato' Lim Ah Chap & Ors [2013] 3 MLJ 374; [2013] 2 CLJ 936, CA (refd)

Kerajaan Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd [2008] MLJU 406; [2008] 6 CLJ 611, CA (refd)

Sateras Resources (M) Bhd, Re [2006] 3 MLJ 140; [2006] 2 CLJ 489, CA (refd)

Voo Nyuk Fah @ Peter Tawau City Motors Sdn Bhd v Lam Yat Kheong & Anor [2002] MLJU 224; [2002] 1 LNS 106, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 29
Rules of Court 2012 r 55, 55(2), 56
Rules of the Court of Appeal 1994 rr 18(4), 18(7A)

Appeal from: Civil Suit No 22–1 of 2009-I (High Court, Kuching)

Ernest Chua (Ernest Chua & Co) for the appellant.
William Kong (Liew Shau Jin with him) (Liew Shau Jin, Advocates) for the respondents.

Abdul Wahab Patail JCA:

[1] The second defendant, Yu Gui ('the appellant') appealed against the decision made on 4 January 2013 by the judge in chambers to allow an appeal from the assessment by the senior assistant registrar on 20 September 2012.

[2] On 20 August 2009, the High Court had set aside and dissolved ex-parte orders for interim injunction granted on 29 June 2009 and ordered damages occasioned thereby be assessed by the deputy registrar and paid by Jeffery Law Siew Su, Ng Siew Hong and Mastika Jaya Timber Sdn Bhd, the first, second and third plaintiffs and the first, second and the third respondents respectively ('the respondents'), to the appellant.

[3] The respondents had obtained on 29 June 2009 by an ex-parte application against Jin Chenji, Yu Gui, Lee Chien-Jung, Rich Efficient Wood Industries Sdn Bhd, PDZ Shipping Agency (Kuching) Sdn Bhd, as first, second, third, fourth and fifth defendants (collectively 'the defendants') interim injunctions which provided for:

(a) the return of two containers of veneer the subject matter of the dispute;

(b) the appellant, Jin Chenji and Lee Chien-Jung to pay Rich Efficient Wood Industries Sdn Bhd's ('the company') money from the sale of goods of the company into account of the company;

(c) the appellant, Jin Chenji and Lee Chien-Jung not to transfer or remove or dissipate their assets out of jurisdiction;

(d) the disclosure of assets of the appellant, Jin Chenji and Lee Chien-Jung;

(e) cross-examination of the appellant, Jin Chenji and Lee Chien-Jung on their affidavits; and

(f) the appellant, Jin Chenji and Lee Chien-Jung not to leave Sarawak until conclusion of their cross-examination, etc.

[4] The company was the fourth defendant, in which the first, second (the appellant herein) and third defendant were shareholders. The fifth defendant was the shipping transporter. The company was set up in 2009 and was involved in the business of production and sale of veneer. It rented premises with 13 factory machineries under a tenancy agreement dated 3 March 2009. Dispute arose over the sale of two containers of goods.

A PRELIMINARY OBJECTION AFTER THE APPELLANT'S SUBMISSIONS

[5] After counsel for the appellant completed his submissions, counsel for the respondents stood up to submit. He raised preliminary objections that the first supplementary record of appeal was filed out of time and the second supplementary record of appeal was served in October just before the appeal, both without leave of the court.

[6] A written summary of the respondents' preliminary objections, and a section on preliminary objections had been included in the written submissions dated 6 August 2013, had been filed before the hearing of the appeal. The grounds were that:

(a) the record of appeal was in breach of the mandatory r 18(4) of the Rules of the Court of Appeal 1994 and Practice Direction No 2 of 1985 because, inter alia:

(i) Part A thereof did not contain the written judgment or grounds of decision or order of the learned High Court judge;

(ii) Part B thereof did not have the notes of the proceedings of the appeal before the learned High Court judge; and

(iii) Part C thereof, which is supposed to contain the documentary exhibits, contained the parties' submissions and not the exhibits,

(b) the supplementary record of appeal dated 16 May 2013 was out of the time prescribed under r 18(7A) of the Rules of the Court of Appeal 1994.

(c) there was no application by the appellant for extension of time and no affidavit to explain the delay.

[7] The supplementary records of appeal corrected the defects summarised at para 6(a) above. The objection was therefore essentially that the two supplementary records of appeal were filed without the leave of the court.

[8] Thus, but for the absence of leave of the court for the supplementary records of appeal, the records of appeal were complete for the appeal to be heard on the merits.

[9] If objections were made for the failure to obtain leave, the parties would be heard thereon before a decision is made to sustain it or not. What needs to be borne in mind is the principle upon which an application to file out of time is made. Even though it is mandatory to obtain leave, leave would be granted if such leave would enable the appeal to be heard on its merits without injustice

to the respondent. It is hard to conceive on an instance when such leave would impose an injustice upon the respondent since the respondent could be granted time to address it.

[10] But in this case counsel chose to sit, hear out the submissions for the appellant and only after submissions for the appellant was completed did counsel stand up to object. The submissions for the appellant were made on the basis of the appeal records as rectified by the supplementary records of appeal which although filed without leave of the court was not objected to by counsel for the respondents.

[11] The cases cited such as *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad* [2010] 2 MLJ 41; [2010] 1 CLJ 444, *Chuah Tim Lan v RHB Bank Bhd* [2008] 6 MLJ 793; [2008] 6 CLJ 500 (CA), *Re Sateras Resources (M) Bhd* [2006] 3 MLJ 140; [2006] 2 CLJ 489, *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [2000] 1 MLJ 335; [2000] 2 CLJ 473 (CA), *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329 (FC), *Dato' Valumalai @ M. Ramalingam S/O V. Muthusamy v Dato' Dr. Tan Chin Woh* [2010] MLJU 410; [2010] 5 CLJ 758; *Kerajaan Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2008] MLJU 406; [2008] 6 CLJ 611 (CA) were not cases where no objection was raised until after completion of the other party's submissions. In each of those cases, objections were made timely and the courts were of the opinion that the non-compliance occasioned a miscarriage of justice.

[12] We bear in mind that the Rules of the Court of Appeal 1994 has provided by the Rules of the Court of Appeal (Amendment) 2002 PU(A) 196/2002 effective since 17 May 2002:

(a) by O 1A that 'In administering any of the Rules herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein'; and

(b) by O 3A that 'A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice'.

[13] These orders underlie the basic philosophy for the interpretation and the application of the rules, not to be interpreted and applied as handicaps for technical knockouts without due regard for the interests of justice. The supplementary records in this case completed the records to enable the appeal to be heard on its merits.

[14] Since the objection was mere technical non-compliance, and raising the objection not before but after submissions for the appeal was completed suggests that the objection was not made bona fide in good faith to avoid a substantial miscarriage of justice.

[15] Accordingly, we accepted the supplementary records of appeal, dismissed the preliminary objection, and directed counsel for the respondents to proceed with the appeal and for which he had filed his written submissions.

THE APPEAL

[16] The appellant had submitted a brief note of submissions on 27 August 2013. It centred on ground 3 of the memorandum of appeal. It is best appreciated by reference to the notes of proceedings of the learned judge in chambers dated 4 January 1013 filed by supplementary record of appeal on 16 May 2013:

> Court:
>
> It is to be noted all the documentary exhibits pertaining to rental payment, purchase of machinery, employment of workers from China, payment of workers' remuneration, petty cash and renovation were admitted into evidence without objection from the plaintiff. In not raising the objection, the plaintiff had conceded to waive the calling of the maker to admit the documents. It therefore does not lie in the mouth of the plaintiff to say that there documentary exhibits were inadmissible.
>
> The issue that arises is whether these documentary exhibits are proof of monetary contribution made by the first defendant towards the setting up of the company. It is to be noted that the amounts claimed by the first defendant are by no means meagre, it runs into hundreds of thousands. In the circumstances, I am of the view that there must be proof that the first defendant had actually dug into his pockets to fork out the alleged money for the setting up of the fourth defendant company. In that respect, the first defendant has failed to do so.
>
> It is pertinent to note that the order of the court is that the damages occasioned by the interlocutory order be assessed. In other words, the burden is on the first defendant to prove that he has sustained loss and damages as a result of the injunction order obtained by the plaintiffs against him and the fourth defendant.
>
> As noted, all the alleged contribution expenditure and contributions were incurred at the time of setting up of the fourth Defendant company. In what way were these monetary contribution and expenditure were damages resulted by the injunction order?
>
> DW2 testified that the factory was closed down on 15 June, 2009 because the first plaintiff sealed it. The established evidence shows that the injunction order was granted only on 29 June, 2009, which was 14 days after the closure. What it shows is that the fourth defendant had already closed down its operation even before the injunction order was made. Hence, by all accounts, it cannot be said that the loss suffered by the first defendant as the result of the closure of the fourth defendant

company is occasioned by the injunction order. In other words, the first defendant has failed to prove a causal link between the alleged loss and damage and the injunction order. Hence, allow the appeal with costs of RM2,000.

[17] In the first paragraph, the learned judge was correct to hold that it does not lie in the mouth of counsel for the plaintiffs (the respondents herein) to object to the admissibility of documentary exhibits that had been admitted without objections by the plaintiffs. The learned judge was also correct that the issue was whether the documentary exhibits were proof of monetary contribution towards the setting up of the company.

[18] We note that the documentary exhibits for expenses claimed by the appellant as defendant herein pertained to rental payment, purchase of machinery, employment of workers from China, payment of workers' remuneration, petty cash and renovation. It is not obviously incredible that these were for the setting up of the factory so that it is not necessary for the respondent to answer it with evidence showing they were not for the factory. That the expenditures were substantial, running into the hundreds of thousands is not reason to require the appellant herein to prove he actually dug into his own pockets to fork out the 'alleged money for the setting up of the fourth defendant', for when the respondents herein as plaintiffs did not object to the documentary evidence of those expenditures for that purpose, it was not 'alleged' but became evidence admitted into evidence without objection. Where the defendant as claimant had placed some evidence that reasonably goes towards proving his claim, but without any evidence adduced by the respondents as plaintiff responding to the defendant's claim for compensation for losses incurred by an ex parte injunction obtained by the plaintiffs, the scale of justice on proof upon a balance of probabilities surely tilts in favour of the appellant as the defendant making the claim. The reality of proof upon a balance of probabilities is that if a defendant does not produce evidence but merely denies or claims the proof is not good enough for him, he has placed nothing on the scales of justice better known as the balance of probabilities; and if both parties have placed proof upon the balance of probabilities, then only the relative weights given to each piece of evidence affects in which direction the balance will tilt.

[19] We note also that the defendant was the person who submitted the evidence of those payments made for the company. It does not matter where he obtained the money from, but in law he is responsible to pay to other persons if he borrowed money from them. He is entitled to seek to recover it from the respondents if their ex parte injunction is the cause of that money being lost. And even if those persons paid to him money that was his, then it was his money that he had spent, and if by the injunction he had lost it, then he is equally entitled to recover it.

[20] As to the finding by the learned judge that the injunction order was only granted on 29 June 2009, while DW2 testified the factory was closed down on 15 June 2009 because the plaintiffs sealed the factory. Without evidence of DW2 there was no evidence adduced to enable a finding when the factory was in fact sealed. Though the order of the court was made on 29 June 2009, it is not impossible there was some kind of sealing attempt before the court order was made. It is equally not impossible for DW2 to have erred on the actual date of sealing or closure. But a fact that the factory was closed down on 15 June 2009 and an injunction was obtained only on 29 June 2009 means that the factory could not be opened by the appellant and the defendants when they choose to do so. These were not considered. The learned judge in chambers has erred therefore on the causal link. The documentary evidence showed expenditure that are not disputed as incredible to be accepted as expenditure incurred for the factory. The standard of proof upon a balance of probabilities does not require that because it is a large amount, the proof must be weightier. Where the appellant got the money from is basically irrelevant, for if borrowed or obtained from another, he ultimately is responsible to pay it back. That the factory has closed down when the injunction was granted does not mean the injunction did not cause any loss. That the injunction prevented reopening when the appellant needs to do so was not considered. A loss is incurred not only when a business is prevented from continuing its business, but also when it is prevented from reopening. And that the expenditures were incurred without expectation that one day there would be an injunction is no answer when it is lost when an injunction is put in place. In short the submissions failed to demonstrate that the losses claimed were did not result from the injunction.

[21] It is clear to our minds that the basis of reasoning upon which the decision was made to allow the appeal and set aside the decision of the learned senior assistant registrar was flawed. When the order was made for assessment before the senior assistant registrar, the latter was formally invested with jurisdiction to make that assessment. It behoves the parties to place evidence before the senior assistant registrar to enable the latter to make the assessment according to law. If any party fails to place that evidence it is too late to scamper to the judge in chambers for a second bite at the cherry on the grounds that the appeal is a rehearing.

[22] It must be borne in mind that r 56 of the Rules of Court 2012 in respect of appeals from the registrar of the High Court to the judge in chambers provide specifically as follows:

> 56 Appeals from Registrar of the High Court to a Judge in Chambers
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> 1 Appeals from certain decisions of Registrar of the High Court to a Judge in Chambers (O 56 r 1)

(1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar of the High Court.

(2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice.

(3) Unless the Court otherwise orders, the notice shall be filed within fourteen days after the judgment, order or decision appealed against was given or made, and shall be served not less than five days before the date fixed for the hearing of the appeal.

(3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that-

(a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

(4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

2 Appeal from Judge (O 56 r 2)

Subject to section 68 of the Courts of Judicature Act 1964, a party may appeal to the Court of Appeal against any judgment, order or decision made by a Judge in Chambers.

[23] The manner the appeal is conducted and heard differs from appeals from subordinate courts to the High Court under r 55 where it is provided in r 55(2) that all appeals to the High Court shall be by way of re-hearing and shall be brought by giving a notice of appeal within fourteen days from the date of the decision appealed from.

[24] We would add that provision that an appeal is a rehearing means it is a rehearing of what is placed in evidence before the trial court, and the High Court intervenes in accordance with s 29 of the Courts of Judicature Act 1964 that 'All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court', and the Rules of Court.

[25] We have addressed the relevant powers of the Court of Appeal in civil appeals earlier above. The purpose of the Courts of Judicature Act 1964 and the rules is to prevent the appellate jurisdiction to rehear from being diluted to the

level of retrials as a matter of course, contrary to the Rules and the Act. It is to ensure that the time of the trial forums, be it a trial court or senior assistant registrar is not wasted by lawyers taking a lackadaisical approach, expecting to be able to fix things upon an appeal. The number of trial courts compared to the number of appellate courts clearly dismisses that expectation as unreasonable, particularly since the profession is expected to be a learned profession to assist the courts in delivering justice for the litigants expeditiously and economically, and for that reason is given protected status in the courts.

[26] There were no grounds in the present appeal that calls for reliance upon the principles set out in *Goo Sing Kar v Dato' Lim Ah Chap & Ors* [2013] 3 MLJ 374; [2013] 2 CLJ 936 (CA) and *Voo Nyuk Fah @ Peter Tawau City Motors Sdn Bhd v Lam Yat Kheong & Anor* [2002] MLJU 224; [2002] 1 LNS 106 that the Court of Appeal is disinclined to reverse the finding of the trial judge on damages as it is an exercise of judicial discretion and such assessment is seldom disturbed unless there is clear error on the principles of law or that the amount is erroneous and without any basis and justification.

[27] In *Goo Sing Kar v Dato Lim Ah Chap*, the High Court dismissed the appellant's appeal to the High Court, but awarded a lesser figure of RM17,847,041.60 after noting that there was an error in calculating the total sum ordered the High Court awarded a lesser figure of RM17,847,041.60 after noting that there was an error in calculating the total sum ordered. The Court of Appeal dismissed the appellant's further appeal on the grounds that the findings of the deputy registrar and the High Court were concurrent, the High Court had meticulously sifted through the evidence in a detailed judgment, and based his confirmation of the award of damages on sound principles of law, and the appellant had failed to demonstrate that there had been any serious error of principle on the part of judge of the High Court when he heard the appeal from the assessment of damages by the deputy registrar. Unlike this case where the judge in chambers allowed the appeal.

[28] In *Voo Nyuk Fah v Lam Yat Kheong*, the defendant therein denied the claim substantially on the basis that the issues of breach of fiduciary duties and fraud did not arise as the first plaintiff and the defendants at all material times had already ended their business relationship in the second plaintiff by way of transfer of their shares therein to the first plaintiff and that the business of timber hauling and the tractors of the second plaintiff were transferred and sold respectively to the defendants as part of the arrangement in the restructuring of the second plaintiff. Assessment was by the High Court on evidence adduced at a trial. It merely demonstrates a meticulous appreciation of the whole of the evidence by the High Court and does not pertain to the approach of appellate jurisdiction on assessment by the registrar upon an order by the trial judge.

[29] In this case, the exercise of judicial discretion by the senior assistant registrar was made by an order of the High Court to be exercised by the senior assistant registrar. Therefore, we found no merit in the above submission by the respondents as there it is a contradiction that the judge of the court may with flawed reasoning interfere with the findings and decision of the senior assistant registrar as authorised and directed by an order of the High Court, but the Court of Appeal must be disinclined to intervene with that decision of the judge in chambers.

[30] Although counsel for the respondents had in his oral submissions summarised his submissions substantially, we had the benefit of his written submissions dated 6 August 2013 and the written summary of respondents' submission. We had taken consideration of the submissions in addressing the reasoning of the judge in chambers.

[31] Accordingly, we allowed the appeal, set aside the order of the judge in chambers, reinstated the order of the senior assistant registrar, fixed costs in the sum of RM15,000 and refunded the deposit paid.

Appeal allowed and order of judge in chambers set aside; order of senior assistant registrar reinstated with costs of RM15,000.

Reported by Afiq Mohamad Noor